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THE CONSTITUTION

01 The Constitutional Regime

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Canadian Unity Information Office
Centre d'information sur l'unité canadienne

Government Publications

THE CONSTITUTIONAL REGIME

DOCUMENTS OUTLINING CANADA'S CONSTITUTION, DEFINING THE SEPARATION OF POWERS AND DEALING WITH THE PROCESS OF CONSTITUTIONAL AMENDMENT.

The Constitution

INTRODUCTION

Canada's Constitution comprises an assortment of written laws and unwritten conventions by which the state is governed. The documents included in this kit will provide a basic understanding of the functions of the Canadian constitutional system of government.

The selection starts with an overview of the history and traditions behind the Constitution, as well as the basic texts which set out the Canadian system of government and define how the rights of its citizens are protected. Next follow statements on the distribution of powers, explaining how the federal and provincial governments share the responsibilities of governing our nation. Finally, the process of how to amend the Constitution is discussed.

I. THE CONSTITUTION (general)

SELECTED DOCUMENT

1. **The Constitution and Government of Canada**, reference paper no. 70, Department of External Affairs, 1975.

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1. Dawson, R.M., **The Government of Canada**, revised by N. Ward, University of Toronto Press, Toronto, 1970.
2. Bonenfant, Jean-Charles, **Institutions politiques canadiennes**, les Presses universitaires de Laval, c.1, 1954.
3. Hopkins, E. Russell, **Confederation at the Crossroads**, McClelland and Stewart, Toronto, 1969, pages 178-187.
4. Arès, Richard, dans **Le Système politique de Canada**, sous la direction de Louis Sabourin, Ottawa: Édition de l'Université d'Ottawa, 1969, c.III.
5. Smiley, D.V., **Canada in Question**, McGraw-Hill Ryerson, Second Edition, Toronto, 1976, pages 1-40.
6. Cheffins, R.J., **The Constitutional Process in Canada**, McGraw-Hill, Toronto, 1969.
7. Barbeau, A., **Le Droit constitutionnel canadien**, Wilson and Lafleur, c.I and II, Montreal, 1974.
8. McConnell, W.H., **Commentary on the British North America Act**, MacMillan of Canada, Toronto, 1977, pages 1-105.
9. Bissonnette, Bernard, **Essai sur la Constitution du Canada**, les Éditions du Jour, Montreal, 1973, pages 89-110.
10. Bonenfant, Jean-Charles, **La Constitution**, in La Presse, Montreal, 1976.
11. **A Consolidation of The British North America Acts, 1867 to 1975**, Department of Justice, 1976.
12. Lederman, W.R., editor, **The Courts and the Canadian Constitution**, McClelland and Stewart, Toronto, 1973.

II. DISTRIBUTION OF POWERS

SELECTED DOCUMENTS

1. **A Consolidation of British North America Acts, 1867 to 1975**, Department of Justice, 1976, pages 24-30.
2. **The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada** (Extracts), Queen's Printer, Ottawa, 1972, pages 43-45.

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1. Westell, A., **The New Society**, McClelland and Stewart, Toronto, 1977, pages 45-55.
2. Bernard, André, **La politique au Canada et au Québec**, les Presses de l'Université du Québec, Montreal, 1976, pages 368-376.
3. Van Loon, R.J., and M.S. Whittington, **The Canadian Political System**, McGraw-Hill Ryerson, Second Edition, 1976, pages 191-226.
4. Dawson, R.M., **The Government of Canada**, revised by N. Ward, University of Toronto Press, 1970.
5. Bonenfant, Jean-Charles, **Institutions politiques canadiennes**, les Presses universitaires de Laval, c.III, 1954.
6. McConnell, W.H., **Commentary on the British North America Act**, MacMillan of Canada, Toronto, 1977, pages 136-292.
7. **The Taxing Powers and the Constitution of Canada**, Government of Canada, E.J. Benson, Minister of Finance, 1969.

*8. **Provincial and Local Taxation in Canada**, by John A. Hayes, Federal-Provincial Relations Office, Ottawa, 1976.

* Available on request from the Canadian Unity Information Office.

The documents contained in this kit are taken from various sources and do not necessarily reflect the Government of Canada's point of view

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9. **Federal-Provincial Grants and the Spending Power of Parliament**, Government of Canada, Working Paper on the Constitution, by Pierre E. Trudeau, Ottawa, 1969.

III. THE PROCESS OF CONSTITUTIONAL AMENDMENT

SELECTED DOCUMENTS

1. **Constitutional Amendment in Canada**, Reference Paper no.113, Department of External Affairs, 1975.
2. **The Amendment of the Constitution of Canada**, Guy Favreau, Minister of Justice, Queen's Printer, Ottawa, 1965, pages 32-39, 50-53.

SUGGESTED READINGS

1. Meekison, J.P., "Constitutional Reform in Canada", in **Canadian Federalism: Myth or Reality**, J.P. Meekison, ed., Methuen Publishing, Second Edition, Toronto, 1971, pages 235-252.
2. Barbeau, A., **Le Droit constitutionnel canadien**, Wilson and Lafleur, Montreal, c.III, 1974.
3. Magone, C.R., **The Confederation Challenge**, background papers and reports no. 2, Ontario Advisory Committee on Confederation, 1970.
4. Hopkins, Russell B., **Confederation at the Crossroads**, McClelland and Stewart, Toronto, 1968, pages 248-274.
5. **The Constitutional Review 1968-1971**, Secretary's Report, Canadian Intergovernmental Conference Secretariat, 1974.
6. **The Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada**, Queen's Printer, Ottawa, 1972, pages 6-10.

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External Affairs Canada
Affaires extérieures Canada

REFERENCE PAPERS

No. 70
(Revised August 1975)

THE CONSTITUTION AND GOVERNMENT OF CANADA

I The Constitution of Canada

In 1867 the British North American Act united the British North American provinces of Canada, New Brunswick and Nova Scotia in one country known as Canada. The new state was originally composed of four provinces -- Ontario, Quebec, New Brunswick and Nova Scotia. Manitoba was admitted to the union in 1870, British Columbia in 1871, and Prince Edward Island in 1873. The Provinces of Saskatchewan and Alberta were formed in 1905 out of the old Northwest Territories of Canada. In 1949 Newfoundland, a separate Dominion that had, since 1934, been under the control of a Commission appointed by the British Government, was admitted to the Canadian federation. At present, Canada consists of ten provinces and two territories. The latter are known as the Yukon Territory and the Northwest Territories, and do not form a part of any of the provinces.

The British North America Act of 1867 established a division of legislative and correlative executive authority between the Parliament of Canada, on the one hand, and the legislatures of the several provinces, on the other. The division of judicial authority between these entities is such that provincially and federally constituted courts frequently have jurisdiction with respect to both federal and provincial laws.

While the B.N.A. Act, with its amendments, is popularly regarded as the Constitution of Canada, it is not, in fact, an exhaustive statement of the laws and rules by which Canada is governed. The Constitution of Canada, in the broadest sense, includes, "inter alia," other British statutes (such as the Statute of Westminster, 1931) and Orders-in-Council (notably those admitting various provinces and territories into the federation.) Included as

well are the succession to the Throne, the royal style and titles, the Governor General, the Senate, the House of Commons, the creation of courts, the establishment of government departments, the franchise and elections, as well as statutes of provincial legislatures of a fundamental constitutional nature similar to those mentioned above. Other written instruments, such as the Royal Proclamation of 1763, the letters patent of October 1, 1947, constituting the office of Governor General of Canada, the commissions of Governors General, and federal and provincial Orders-in-Council authorized by their respective statutes, provide further constitutional material, as do the decisions of the courts that interpret the B.N.A. Acts and other statutes of a constitutional nature.

In addition, the Constitution of Canada includes substantial sections of the common law, unwritten constitutional usages and conventions and principles of representative and responsible government.

No provision was made in the B.N.A. Act, 1867, for its amendment by any legislative authority in Canada, though the Parliament of Canada and the provincial legislatures were given legislative jurisdiction to amend or affect certain of the forms, rights and structures of their respective governments.

An amendment to the B.N.A. Act passed in 1949 considerably enlarged the authority of the Parliament of Canada to legislate with respect to constitutional matters; it may now amend the Constitution of Canada except as regards the legislative authority of the provinces, the rights and privileges of any class of persons with respect to schools, the use of English or French, the requirement for a session of Parliament at least once a year, and, generally, the maximum five-year life of each Parliament. Though the search for a satisfactory procedure for amending the Constitution wholly within Canada has been the subject of repeated consideration in Canada, in the absence of full agreement by the federal and provincial governments the residual power to amend the B.N.A. Act continues to be exercised by the British Parliament at the request of the Government of Canada.

II The Government of Canada

1. The Federal Government

In Canada, there is a fusion of the executive and legislative powers. Formal executive power in Canada is vested in the Queen, whose authority is delegated to her representative, the Governor General. Legislative power is vested in the Parliament of Canada, which consists of the Queen, an appointed upper house, called the Senate, and a lower house, called the House of Commons, elected by universal adult suffrage. The independence of the judiciary is safeguarded through the constitutional provision that superior court judges cannot be removed from office unless both Houses of Parliament and the Governor General agree.

The Executive

The Crown

The British North America Act states that "the Executive Government and authority of and over Canada is hereby declared to continue and be vested in the Queen." However, as we have seen, it was intended by the Fathers of Confederation that Canada should have"...a constitution similar in principle to that of the United Kingdom...," and thus that the vital unwritten portion of the constitution--the practice of responsible cabinet government and the common law definitions of the scope of executive authority--should obtain in Canada. Thus the Government of Canada remains vested in the Queen but is in practice carried on, almost without exception, through the authorization of her constitutional advisors, the Members of Cabinet, who are in turn still responsible to Parliament.

The Governor General

The Governor General is the personal representative in Canada of the sovereign, by whom he is appointed on the recommendation of the Prime Minister of Canada.

The Queen, the Senate and the House of Commons constitute the Parliament of Canada. The Queen, normally represented by the Governor General, must give assent to all enactments passed by the Senate and the House of Commons before they can become law. This and other statutory powers given to the Governor General must again be read in conjunction with the long-established doctrine of responsible government; these powers are, in practice, exercised only by and with the advice of the Cabinet or any of its members. In practice, royal assent to the enactments of the Houses of Parliament is always given.

The Governor General's discretion in exercising his powers is closely regulated by previous usage and the counsel of constitutional doctrine, and rarely involves more than the formal recognition of an existing situation. A third group of functions of the Governor General comprises the ceremonial duties of a head of state and the patronage of worthy endeavours and fields of Canadian activity.

The Governor in Council and the Privy Council

The B.N.A. Act, 1867, provided what the Queen's Privy Council for Canada should be constituted to aid and advise in the Government of Canada. This Council is composed of members who are appointed and sworn in by the Governor General on the advice of the Prime Minister, and who generally retain their membership for life. The Council consists chiefly of present and former ministers of the Crown. The Privy Council does not meet as a functioning body, and its constitutional responsibilities as advisor to the Crown are performed exclusively by those ministers who constitute the Cabinet of the day. In this fashion, Council and Cabinet are two aspects of the

same constitutional organism. In practice most of the executive powers exercised by the Governor General in Council, such as the making of Orders-in-Council, are performed by Cabinet resolving itself into a Committee of Council. The resulting Orders-in-Council are then signed by the Governor General.

The Cabinet

The Cabinet consists of those Privy Councillors whom the Prime Minister invites to its meetings. In practice, this means the heads of all Federal Government departments and ministries, and also a few ministers of state without departments or ministries. By custom, all ministers must have a seat in one House or the other (essentially in the "Commons"), or get one within a reasonable time, so as to ensure accountability to Parliament.

The Cabinet forms a link between the Governor General and the Parliament. It is, for virtually all purposes, the real executive. The Cabinet's primary responsibility in the Canadian political system is to determine priorities among the demands expressed by the people (or discerned by the Government) and to define policies to meet those demands. The Cabinet is responsible for the administration of all Government departments, prepares by far the greater part of the legislative program of Parliament and exercises substantial control over all financial questions -- within the limits of Parliamentary approval for the expenditure of public funds.

Each minister of a department is answerable to the House of Commons for that department, and the whole Cabinet is similarly answerable for Government policy and administration generally. When the Government loses the confidence of the House of Commons, it may either resign, in which case the Governor General may call upon the Leader of the Opposition to form a Government, or the Prime Minister may request the Governor General to dissolve Parliament and call a general election. If, in the subsequent election, the former Opposition is returned with sufficient support to secure the confidence of the new " House," the Governor General will in all probability ask its leader to form the new Government.

The Prime Minister

The Prime Minister is that leader of the party with the strongest representation in the House of Commons. The Prime Minister chooses his Cabinet and recommends their appointment by the Governor General. When a Prime Minister vacates his office, this act normally carries with it the resignation of all those in the Cabinet, though when a member of Cabinet alone resigns the remainder of the Cabinet is undisturbed.

One source of the authority of the Prime Minister lies in his prerogative to recommend the dissolution of Parliament. This prerogative, which in most circumstances permits him to precipitate an election, is a source of considerable power both in his dealings with his colleagues and with the other parties in the House of Commons.

Another source of the Prime Minister's authority derives from the appointments he recommends, including Privy Councillors, Cabinet Ministers, Lieutenant-Governors of the provinces, Speakers of the Senate, Chief Justices of all federally-appointed courts, Senators, and certain senior executives of the Public Service. The Prime Minister also recommends the appointment of a new Governor General to the Sovereign, although this normally follows consultation with his Cabinet.

III The Legislature

Parliament

The federal legislative authority is vested in the Parliament of Canada, consisting of the Queen, the Senate and the House of Commons. Bills may originate in either the Senate or the Commons, subject to the provisions of Section 53 of the British North America Act, 1867, which provides that bills for the appropriation of any part of the public revenue or the imposition of any tax or impost shall originate in the House of Commons. Bills must pass both Houses and receive royal assent before becoming law. In practice, most public bills (whether introduced by the Government or a private member) originate in the House of Commons, although there has been a marked increase recently in the introduction of public bills in the Senate. Private bills -- that is, legislation having a private effect and purpose, such as the incorporation of corporations with Dominion objects -- usually originate in the Senate.

Under Section 91 of the British North America Act, as amended, the legislative authority of the Parliament of Canada extends to the making of laws for the "Peace, Order and good Government of Canada." It includes authority to legislate in respect to:

1) the amendment of the Constitution of Canada, subject to certain exceptions;
1a) the public debt and property;
2) the regulation of trade and commerce;
2a) unemployment insurance;
3) the raising of money by any mode or system of taxation;
4) the borrowing of money on the public credit;
5) postal service;
6) the census and statistics;

7) militia, military and naval service, and defence;
8) the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada;
9) beacons, buoys, lighthouses, and Sable Island;
10) navigation and shipping;
11) quarantine and the establishment and maintenance of marine hospitals;
12) seacoast and inland fisheries;
13) ferries between a province and any country or between two provinces;
14) currency and coinage;
15) banking, incorporation of banks, and the issue of paper money;
16) savings banks;
17) weights and measures;
18) bills of exchange and promissory notes;
19) interest;
20) legal tender;
21) bankruptcy and insolvency;
22) patents of invention and discovery;
23) copyrights;
24) Indians, and lands reserved for the Indians (Eskimos are included;)
25) naturalization and aliens;
26) marriage and divorce;
27) the criminal law, except the constitution of courts of criminal jurisdiction, but including the procedure in criminal matters;
28) the establishment, maintenance and management of penitentiaries;
29) steamship lines, railways, ships, canals, telegraphs and other works and undertakings extending beyond the limits of a province, and other works declared by the Parliament of Canada to be for the general advantage of Canada.

In addition, under Section 95 of the B.N.A. Act, 1867, the Parliament of Canada may make laws relating to agriculture and immigration concurrently with provincial legislatures, although, in the event of conflict, federal legislation is paramount. By the B.N.A. Act, 1951, as amended in 1964, it was declared that the Parliament of Canada might make laws in relation to old-age pensions and supplementary benefits in Canada, but that no such law should affect the operation of any provincial laws in relation to these matters.

The Senate

Much debate occurred in 1867 over the composition and the powers of the Senate because its establishment was at that time considered to be a very important balancing mechanism in the new federal system. It was intended to offset the influence of the newly-created central institutions by the creation at the national level of a legislative body composed of members appointed on a regional basis. In this way a legislative body was established to protect the interests

of the provincials in matters under federal jurisdiction, with a distribution of members intended to assure Quebec and the smaller provinces that, in the exercise of that jurisdiction, their interests would have a minimum weight beyond that which the size of their population would otherwise give them.

Senators are appointed by the Governor General, who acts on the recommendation of the Prime Minister. Bill C-3, which recently received royal assent, has increased Senate membership from 102 to 104. The previous allocation of seats had been 24 each to Ontario, Quebec, the four Western provinces as a group and the three Maritime Provinces as a group, with six seats allotted to Newfoundland. The two new Senators will represent the Yukon and the Northwest Territories.

The B.N.A. Act gives the Senate exactly the same powers as the House of Commons, except that money bills must originate in the Commons.

The House of Commons

In 1867, pursuant to Section 37 of the B.N.A. Act, it was provided that the House of Commons should consist of 181 members. The Act provided in Section 51 that Quebec should have a fixed number of 65 members and that each of the other provinces should be assigned such a number of members as would bear the same proportion to its population as the number 65 bore to the population of Quebec. This Act also provided that, on completion of a census in 1871 and after each subsequent decennial census, the representation of the provinces should be readjusted, provided that the proportionate representation of the provinces fixed by the Act remained undisturbed. Membership in the House of Commons was accordingly increased from time to time, until it reached 255.

As a result of some dissatisfaction with the manner in which these provisions of the B.N.A. Act relating to representation had failed to maintain equitably the proportionate representation of the provinces, the original Section 51 was repealed in 1946, and new sections were substituted in 1946, 1952 and finally in 1974-75. In the interim, as a result of the union of Newfoundland with Canada in 1949, provision was made for the Province of Newfoundland to be represented by seven members in the House of Commons. Also, in the 1952 revision of Section 51, a provision was introduced in an effort to eliminate sharp reductions in provincial representation from one census to another.

Pursuant to the rules of Subsections 51(1) and 51(2), membership in the House of Commons is now to be 282. This number will

be realized upon the completion of the work of electoral boundaries readjustment and a subsequent federal election. For the moment, there are 264 members of the House of Commons.

The Opposition

The Opposition occupies an essential place in constitutions based on the British Parliamentary system. In the same way as other institutions, such as a responsible Cabinet, the Opposition has seen its role shaped by unwritten customs that have been accepted and become firmly established in Canada.

The Canadian electorate not only determines who shall govern Canada but, by deciding which party receives the second-largest number of seats in the House of Commons, it designates which of the major parties becomes the Official Opposition, the leader of which is described as the Leader of the Opposition.

Although the position of Leader of the Opposition is not recognized in the British North America Act, it received statutory acknowledgment in Canada in 1927. The Senate and House of Commons Act of that year provided for an annual salary to be paid to the Leader of the Opposition in addition to his indemnity as a Member of the House. In 1963, the Senate and the House of Commons Act was further amended to provide for an annual allowance to each Member of the House of Commons (other than the Prime Minister or Leader of the Opposition) who is the leader of a political party that is represented by 12 or more Members in the House.

The function of the parliamentary opposition is to offer constructive criticism of the Government of the day, to ensure that Government proposals are carefully reviewed before they pass into law, to ensure the accountability of the Cabinet for executive policies and activities, and to suggest alternative policies for the governing of Canadians.

The Legislatures

The Source of legislative authority for the provincial legislatures is the British North America Act, 1867, as amended. Under Section 92 of the Act, the legislature of each province may make laws exclusively in relation to the following matters:

1) the amendment of the constitution of the province except as regards the office of the lieutenant-governor;

2) direct taxation within the province in order to raise revenue for provincial purposes;

3) the borrowing of money on the credit of the province;

4) the establishment and tenure of provincial offices and the appointment and payment of provincial officers;

5) the management and sale of the public lands belonging to the province and of the timber and wood thereon (and pursuant to Section 109 of the Act, all lands, mines, minerals and royalties belong to the provinces as well);

6) the establishment, maintenance and management of public and reformatory prisons in and for the province;

7) the establishment, maintenance and management of hospitals, asylums and charitable institutions in and for the province, other than marine hospitals;

8) municipal institutions in the province;

9) shop, tavern and other licences issued for the raising of provincial, local or municipal revenue;

10) local works and undertakings, other than those expressly within federal jurisdiction:

11) the incorporation of companies with provincial objects;

12) the solemnization of marriage in the province;

13) property and civil rights in the province;

14) the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those courts;

15) the imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subject enumerated in this section; and

16) generally all matters of a merely local or private nature in the province and not enumerated in Section 91 as a matter coming under federal jurisdiction.

Furthermore, in and for each province the legislature may, under Section 93, make laws exclusively in relation to education, subject to certain restrictions relating to rights or privileges held by certain religious denominations with respect to schools.

As had been noted in the discussion of federal legislative jurisdiction, the provinces, share powers of legislation respecting agriculture and immigration, and have an overriding legislative jurisdiction with respect to old-age pensions and supplementary benefits.

IV The Judiciary

The Federal Judiciary

The Parliament of Canada is empowered by Section 101 of the British North America Act, 1867, to provide, from time to time, for the constitution, maintenance and organization of a general court of appeal for Canada and for the establishment of any additional courts for the better administration of the laws of Canada. Under this provision, Parliament has established the Supreme Court of Canada, the Federal Court of Canada and certain miscellaneous courts.

Supreme Court of Canada

This Court, first established in 1875 and now governed by the Supreme Court Act, consists of the Chief Justice of Canada, and eight puisne judges.

The Court sits at Ottawa and exercises general appellate jurisdiction throughout Canada in civil and criminal cases. It should be noted that provincial courts and the Supreme Court of Canada apply both provincial and federal laws and that their division of authority is not coincident with the division of legislative authority between the federal and provincial governments. The Court is also required to consider and advise upon questions referred to it by the Governor in Council and it may also advise the Senate or House of Commons on private bills referred to the Court under any rules or orders of the Senate or the House of Commons.

Generally speaking, in civil cases appeals may now be brought from any judgment of the highest court of final resort in a province only when leave to appeal has been sought and secured either from the highest court of final resort in that province or from the Supreme Court of Canada itself, In the latter case leave may be granted even when such leave has been refused by any other court, when, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law involved in such question, one that ought to be decided by the Supreme Court. The former automatic right of appeal to the Supreme Court in civil cases where the sum claimed is in excess of $10,000 has been repealed as of January 27, 1975.

In criminal cases the appellate jurisdiction of the Supreme Court is conferred by Sections 613-624 of the Criminal Code. Aside from cases in which a person stands sentenced to death, or in jeopardy of such a sentence, persons convicted of an indictable offence may appeal to the Supreme Court only on a question of law on which a judge of the provincial court of appeal dissents or on a question of law with leave of the Supreme Court.[1]

Appeals from the federal courts, primarily the Federal Court of Canada, are regulated by the statute establishing them Such appeals may essentially be made only with leave of the court.

The judgment of the Supreme Court of Canada in all cases is final and conclusive.

Federal Court of Canada

This Court consists of two divisions, Trial and Appeal, with a total of 12 judges. Both divisions sit throughout Canada.

The Federal Court of Appeal has as part of its jurisdiction the competence to review all decisions and orders of a judicial or quasi-judicial nature rendered by federal boards or other tribunals, on questions of error in law, excess of jurisdiction, or failure to apply the principles of natural justice. This division's jurisdiction includes admiralty, patents, customs and excise, and income tax. It also has jurisdiction in claims involving industrial property and in suits involving the Crown in right of Canada.

An appeal lies to the Supreme Court of Canada from any judgment of the Federal Court of Appeal with leave of that Court when, in the opinion of the Court of Appeal, the question involved in the appeal is one that ought to be submitted to the Supreme Court for decision. Further, an appeal to the Supreme Court lies from a final or other judgment or determination of the Federal Court of Appeal, whether or not leave to make such appeal has been refused by the latter Court, when, in the opinion of the Supreme Court, the question involves a matter of public or legal importance. As with civil appeals to the Supreme Court of Canada, the former automatic right to appeal from a judgment of the Federal Court of Appeal in cases in which the amount in controversy exceeds $10,000 has been repealed as of January 27, 1975. An appeal to the Supreme Court continues to lie from any decision of the Federal

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1. Canadian Unity Information Office Footnote:

Subsequent to the passing of Bill C-84, the Criminal Law Amendment Act (No.2), 1976, the death sentence has been abolished in the courts of Canada. The appeal procedure in general is presently under review by the Department of Justice.

Court of Appeal in the case of a controversy between Canada and a province or between two or more provinces.

Provincial Judiciaries

Under Section 92(14) of the British North America Act, 1867, the legislature of each province may exclusively make laws in relation to the administration of justice in the province, including the constitution, maintenance and organization of provincial courts, both of civil and criminal jurisdiction.

In 1970 Parliament extended the same legislative powers in respect of the administration of justice to the Legislative Councils of both the Yukon and Northwest Territories. These courts of provincial or territorial creation administer both provincial and federal laws to the extent that the administration of the latter is not confided exclusively to a tribunal established by Parliament under Section 101 of the B.N.A. Act, 1867.

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CANADA

EXTRACTS FROM

A Consolidation of

THE BRITISH NORTH AMERICA ACTS

1867 to 1975

DEPARTMENT OF JUSTICE
CANADA

Prepared for the Department of Justice by
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89. Repealed. (38)

6.—THE FOUR PROVINCES.

Application to Legislatures of Provisions respecting Money Votes, etc.

90. The following Provisions of this Act respecting the Parliament of Canada, namely,—the Provisions relating to Appropriation and Tax Bills, the Recommendation of Money Votes, the Assent to Bills, the Disallowance of Acts, and the Signification of Pleasure on Bills reserved,—shall extend and apply to the Legislatures of the several Provinces as if those Provisions were here re-enacted and made applicable in Terms to the respective Provinces and the Legislatures thereof, with the Substitution of the Lieutenant Governor of the Province for the Governor General, of the Governor General for the Queen and for a Secretary of State, of One Year for Two Years, and of the Province for Canada.

VI.—DISTRIBUTION OF LEGISLATIVE POWERS.

Powers of the Parliament.

Legislative Authority of Parliament of Canada.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or the Government of a province, or to any class of persons with respect to

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(38) Repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.). The section read as follows:

5. ONTARIO, QUEBEC, AND NOVA SCOTIA.

89. Each of the Lieutenant Governors of Ontario, Quebec and Nova Scotia shall cause Writs to be issued for the First Election of Members of the Legislative Assembly thereof in such Form and by such Person as he thinks fit, and at such Time and addressed to such Returning Officer as the Governor General directs, and so that the First Election of Member of Assembly for any Electoral District or any Subdivision thereof shall be held at the same Time and at the same Places as the Election for a Member to serve in the House of Commons of Canada for the Electoral District

schools or as regards the use of the English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of the return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House. (39)

1A. The Public Debt and Property. (40)
2. The Regulation of Trade and Commerce.
2A. Unemployment insurance. (41)
3. The raising of Money by any Mode or System of Taxation.
4. The borrowing of Money on the Public Credit.
5. Postal Service.
6. The Census and Statistics.
7. Militia, Military and Naval Service, and Defence.
8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.
9. Beacons, Buoys, Lighthouses, and Sable Island.
10. Navigation and Shipping.
11. Quarantine and the Establishment and Maintenance of Marine Hospitals.
12. Sea Coast and Inland Fisheries.
13. Ferries between a Province and any British or Foreign Country or between Two Provinces.
14. Currency and Coinage.
15. Banking, Incorporation of Banks, and the Issue of Paper Money.
16. Savings Banks.
17. Weights and Measures.
18. Bills of Exchange and Promissory Notes.
19. Interest.
20. Legal Tender.
21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.

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(39) Added by the *British North America (No. 2) Act, 1949*, 13 Geo. VI, c. 81 (U.K.).

(40) Re numbered by the *British North America (No. 2) Act, 1949*

(41) Added by the *British North America Act, 1940*, 3-4 Geo. VI, c. 36 (U.K.).

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

28. The Establishment, Maintenance, and Management of Penitentiaries.

29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. (42)

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(42) Legislative authority has been conferred on Parliament by other Acts as follows:

1. The *British North America Act, 1871*, 34-35 Vict., c. 28 (U.K.).

> **2.** The Parliament of Canada, may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.
>
> **3.** The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.
>
> **4.** The Parliament of Canada may from time to time make provision for the administration peace, order, and good government of any territory not for the time being included in any Province.
>
> **5.** The following Acts passed by the said Parliament of Canada, and intituled respectively,– "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba," shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.
>
> **6.** Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act 1868*, 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893*, 56-57 Vict., c. 14 (U.K.)) had previously conferred similar authority in relation to Rupert's Land and the North-Western Territory upon admission of those areas.

2. The *British North America Act, 1886*, 49-50 Vict., c. 35, (U.K.).

> **1.** The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931*, 22 Geo. V, c. 4, (U.K.).

> **3.** It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

Exclusive Powers of Provincial Legislatures.

Subjects of exclusive Provincial Legislation.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,—

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—
    (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
    (*b*) Lines of Steam Ships between the Province and any British or Foreign Country;
    (*c*) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.

14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.

16. Generally all Matters of a merely local or private Nature in the Province.

Education.

Legislation respecting Education

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the

Provisions of this Section and of any Decision of the Governor General in Council under this Section. (43)

Uniformity of Laws in Ontario, Nova Scotia and New Brunswick.

94. Notwithstanding anything in this Act, the Parliament of Canada may make Provision for the Uniformity of all or Legislation for Uniformity of Laws in Three Provinces.

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(43) Altered for Manitoba by section 22 of the *Manitoba Act*, 33 Vict., c. 3 (Canada), (confirmed by the *British North America Act, 1871*), which reads as follows:

> **22.** In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:—
>
> (1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:
>
> (2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:
>
> (3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

Altered for Alberta by section 17 of *The Alberta Act*, 4-5 Edw. VII, c. 3 which reads as follows:

> **17.** Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:—
>
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.
>
> **2.** In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.
>
> **3.** Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

Altered for Saskatchewan by section 17 of *The Saskatchewan* Act, 4-5 Edw. VII, c. 42, which reads as follows:

> **17.** Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—
>
> (1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.
>
> **2.** In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.
>
> **3.** Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick, and of the Procedure of all or any of the Courts in Those Three Provinces, and from and after the passing of any Act in that Behalf the Power of the Parliament of Canada to make Laws in relation to any Matter comprised in any such Act shall, notwithstanding anything in this Act, be unrestricted; but any Act of the Parliament of Canada making Provision for such Uniformity shall not have effect in any Province unless and until it is adopted and enacted as Law by the Legislature thereof.

Old Age Pensions.

Legislation respecting old age pensions and supplementary benefits.

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter. (44)

Agriculture and Immigration.

Concurrent Powers of Legislation respecting Agriculture, etc.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Altered by Term 17 of the Terms of Union of Newfoundland with Canada (confirmed by the *British North America Act, 1949*, 12-13 Geo. VI, c. 22 (UK.)), which reads as follows:

> **17.** In lieu of section ninety-three of the British North America Act, 1867, the following term shall apply in respect of the Province of Newfoundland:
>
> In and for the Province of Newfoundland the Legislature shall have exclusive authority to make laws in relation to education, but the Legislature will not have authority to make laws prejudicially affecting any right or privilege with respect to denominational schools, common (amalgamated) schools, or denominational colleges, that any class or classes of persons have by law in Newfoundland at the date of Union, and out of public funds of the Province of Newfoundland, provided for education,
>
> (*a*) all such schools shall receive their share of such funds in accordance with scales determined on a non-discriminatory basis from time to time by the Legislature for all schools then being conducted under authority of the Legislature; and
>
> (*b*) all such colleges shall receive their share of any grant from time to time voted for all colleges then being conducted under authority of the Legislature, such grant being distributed on a non-discriminatory basis.

(44) Added by the *British North America Act, 1964*, 12-13, Eliz. II, c. 73 (U.K.). Originally enacted by the *British North America Act, 1951*, 14-15 Geo. VI, c. 32 (U.K.), as follows:

> **94A.** It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions

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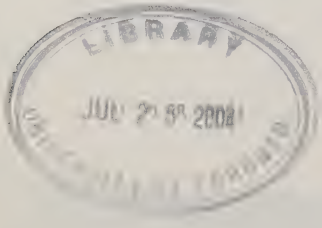
The following extracts are from the final report of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada. The report is the result of a two year study undertaken to examine and report upon proposals for constitutional reform raised during the period 1968-1970.

The Special Joint Committee held 145 public meetings, and received more than 8,000 pages of evidence. The Committee travelled extensively throughout Canada, visiting all Provinces and Territories, and heard the views and opinions of Canadians from all walks of life on the fundamental issues confronting Canada and its constitutional development. Included in this evidence were the views of acknowledged experts on the Constitution.

The length of the complete document prohibits its inclusion in a documentation kit in its entirety; we have therefore selected specific pages for your use. Pages 43-45 provide an interesting discussion of the distribution of powers. The summary of recommendations illustrates to the reader the vast scope of the proposals for constitutional reform dealt with by the Special Joint Committee.



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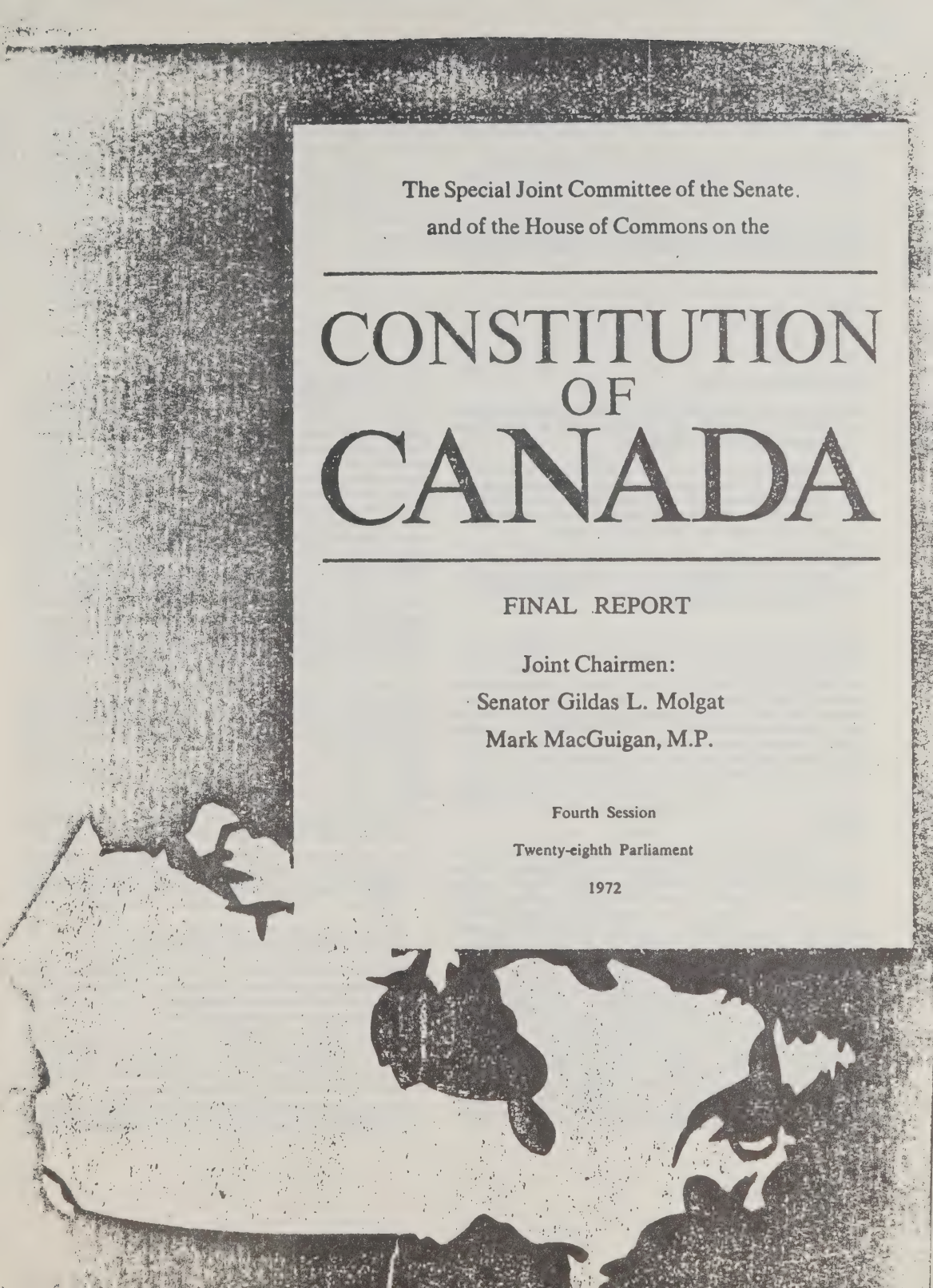
The Special Joint Committee of the Senate
and of the House of Commons on the

CONSTITUTION OF CANADA

FINAL REPORT

Joint Chairmen:
Senator Gildas L. Molgat
Mark MacGuigan, M.P.

Fourth Session
Twenty-eighth Parliament
1972



PART IV—THE GOVERNMENTS

Chapter 17—The Division of Powers

RECOMMENDATIONS

49. The use of exclusive lists of Federal and Provincial powers, but with an extended list of concurrent powers, should be continued.

50. Concurrent powers which predominantly affect the national interest should grant paramountcy to the Federal Parliament and those which predominantly affect Provincial or local interests should grant paramountcy to the Provincial legislatures.

51. The Constitution should permit the delegation of executive and administrative powers (as at present), but not of legislative powers, except where expressly specified in this Report.

Federal states exist because there is a political will to unite for certain purposes and to remain apart for others. Consequently one of the most complex aspects of a federal constitution is the division of powers between the central and local authorities in a manner which will reflect the political will and political reality. Political scientists and constitutional lawyers have attempted to construct ideal prototypes and absolute criteria to answer the questions as to how powers should be divided and as to which level should have predominant authority, but, for the most part, federal states and federal constitutions have resulted from political bargaining and not from ideal models.

The question as to how powers should be divided has often been resolved in different ways depending on the priorities and political strength of the constituent parts. Among the competing criteria which are often advanced are: economic efficiency and prosperity, national or uniform standards, the need for collective action, increased strength and power, the threat of foreign or external domination, greater mobility, cultural survival, individualism, the right to self-determination of national groups and peoples, power to the people, the need for more personal government, and the need for less bureaucracy. These criteria often conflict and will only be accommodated to the extent that political forces allow them. The argument that more authority in the central government will result in a higher standard of living will not convince the minority groups who are willing to give a higher place to their social needs than to economic benefits. Most Canadians seek a constitutional formula which will provide a balance between both tendencies.

The division of powers set out by the Fathers of Confederation in 1867 seemed to give more power to the Federal Parliament than to the Provincial Legislatures, and seemed to favour a system in which Parliament would be the dominant authority. The peace, order and good government clause, the disallowance power, the residuary power, the nature of the powers in section 91 as opposed to section 92; sections 24, 58, 59, 90, 93, 94, 95 and 96 and the general spirit of the entire Constitution all point to this. The situation, however, has been changed to a great extent by Court decisions and, in particular, by the decisions of the Judicial Committee of the Privy Council which greatly extended Provincial authority by expanding jurisdiction under "property and civil rights" and "municipal institutions." The principle adopted by the Judicial Committee that the Legislatures are not subordinate to the Federal Parliament, but are as sovereign in their jurisdiction as the Federal Parliament in its jurisdiction also enhanced the position of the Provinces.

As a result, after 105 years of judicial interpretation and of legislative and administrative practice, we now have a Constitution where the legislative power is about equally divided between the Provincial Legislatures and the Federal Parliament.

The principal general criticisms we have heard of the present division of powers are the following:

(1) The Federal Parliament does not have sufficient power to manage and plan the economy.

(2) The Federal Parliament does not have sufficient power to cope with large multinational corporations, international unions, and the overwhelming influence and power of the United States of America.

(3) The citizens of Canada are handicapped by the lack of national standards in education.

(4) The Federal Parliament does not have the power to implement a policy of bilingualism in education and other areas now under Provincial jurisdiction, despite the requirements of national unity.

(5) The citizens of Canada are handicapped by varying Provincial standards in fields which cross Provincial boundaries—e.g., pollution, securities regulation, labour legislation, traffic regulation, etc.

(6) The present Federal role in social legislation (particularly in shared-cost programs) interferes with or

prevents the Provinces from varying the programs in accordance with Provincial needs, resources, and priorities. It also leads to a poor allocation of public funds and an excessive bureaucracy.

(7) The Province of Quebec does not feel that it has sufficient powers to guarantee the survival of the French language and culture and to establish the social and economic institutions necessary to attain this goal.

(8) The present division of powers is too rigid to allow for varying Provincial and Federal needs. The constitution requires greater flexibility.

(9) The present division of powers is unclear and imprecise, giving rise to much litigation and judicial interpretation. It is also incomplete and does not provide for jurisdiction over modern technology and its resulting problems. The division of powers must be more functional.

(10) The grammatical construction of the jurisdictional categories is poor and there is no logical consistency in the relationship between the categories. Some of the categories are based on things; others are based on persons, location, behaviour, or activities. Again, this leads to imprecision and litigation.

During the hearings of the Committee there were many briefs and much discussion relating to the deficiencies of the present division of powers and many proposed solutions. We shall summarize here the main alternatives which were presented.

The provision of exclusive powers for the Federal Parliament and the Provinces, with a greater number of *concurrent powers* and a residual clause favouring the Federal or Provincial authorities, would be similar to the present structure, with the difference that there would be a greater use of concurrent powers. The provisions relating to concurrent powers could stipulate which level was paramount. They could also stipulate whether the inferior level could legislate without the consent of the paramount level up to the point of conflict, in which case the legislation of the paramount level would prevail; or, whether the inferior level would require the consent of the paramount level before it could legislate at all. In the United States and Australia, the states can legislate in certain fields without the consent of the central government until the central government decides to legislate, or until it legislates in conflict with the legislation of the states. In the United States, there are additional fields where the states can legislate only with the consent of the federal government.

An extended use of concurrent powers would provide for greater flexibility. It would allow the Provinces to act in their own right in certain areas which were primarily Federal, or to supplement national measures through special provisions for regional needs. On the other hand, it would give the central government the right to assure a certain minimum standard in areas which were primarily provincial.

Concurrent powers are widely used in federal constitutions. The Canadian constitution is the most limited in this respect, with only three concurrent powers, while India is the most extensive, with a list of forty-seven concurrent powers. Switzerland has divided powers in addition to concurrent powers.

Another possibility is the provision of exclusive Federal and Provincial powers with *the right of delegation*. Delegation could be permitted one way or both ways: either from the Federal Parliament to the Provinces or from the Provinces to the Federal Parliament; or the right to delegate from each level to the other. It could also be stipulated whether the delegation would take place between the Federal Parliament and a single Provincial Legislature or whether it could take place only when a minimum number of Provincial Legislatures are in agreement. The delegation could apply to all legislative powers, to specified powers, or to executive or administrative powers. This mechanism is in some ways more flexible than concurrent powers and in other ways less flexible. The chief danger is the creation of special status for a minority of provinces or a single province.

The provision for executive delegation is widespread in the newer federal constitutions while legislative delegation is more limited. It is, however, generally provided for, and is allowed in both directions.

Some federal constitutions provide for exclusive powers to one level only, combined with concurrent powers and *a residual power* to the other level. This is the situation in the United States, Australia, Switzerland and Germany where there are exclusive powers only for the central governments as well as concurrent powers with paramountcy to the federal governments, and all other matters are local. According to some this is a more precise method of dividing powers.

An alternative method is *to divide powers* on a national or local basis without regard to subject matter. In this way a federal government could legislate on all matters in those aspects which affect the interest of the entire country or where the activity was interprovincial or international; while the area governments could legislate for all matters which were local or completely within provincial territory. The Fathers of Confederation seemed to have this concept in mind when they drafted the Peace, Order and good Government clause in section 91 and the enabling clauses in section 92.

This method of dividing powers could be used with lists of exclusive and concurrent powers and might thereby serve as a dual residual clause. This would mean that all matters not exclusively listed which were basically national would come under Federal jurisdiction, while those which were basically local or regional would come under Provincial jurisdiction.

Many Committee witnesses have referred to the rigidity of the present division of powers and have urged greater flexibility. We have already referred to the use of concurrent powers and delegation as two means of achieving flexibility. Other important methods are a usable amending formula, special powers which come into operation in emergencies (war, revolution, internal disorder, natural disasters, economic emergencies, etc.), mechanisms or institutions for intergovernmental cooperation (Federal-Provincial conferences, interprovincial coordinating agencies, and independent national commissions for taxation and public spending), and the use of the Federal spending power and shared-cost programs.

Some witnesses suggested that some Provinces (e.g., Quebec) should have greater or more constitutional powers than other Provinces. This would mean that these *special-status Provinces* would be able to legislate for matters on which the Federal Parliament would legislate for the people in other Provinces. This would not be in virtue of a delegation of power or through concurrent powers but through sovereign powers which would be special for certain Provinces.

This type of special status is often confused with special constitutional provisions for one or several provinces. We should note that several Provinces now have and have always had special constitutional provisions without having special legislative powers not existing in other Provinces. Quebec is thus constitutionally entitled to use the civil law system in the area of property and civil rights, but this is not a special status since the area of private law is under provincial jurisdiction for all Provinces. There are also Federal and Provincial legislative provisions which apply in some Provinces and make them different, but, again, these Provinces do not have a special status in that they have special legislative powers. Consequently, the Constitution has recognized and can continue to recognize that Quebec is not a Province like the others without according it special or additional legislative powers.

Despite the fact that a Province might have special constitutional provisions and special legislative provisions to meet its particular needs without having a special status, some would still argue that special status, or additional legislative power, is desirable. The arguments we heard against this type of special status are:

(1) That it isolates a particular Province and, in effect, destroys the minimum requirements for a federal state;

(2) That it places the special-status Province and its representatives in an untenable position in Federal institutions;

(3) That it creates different classes of citizenship within the same state;

(4) That it jeopardizes the integrity of the state, internally and externally.

It is possible to conceive of some type of special status of this nature, but it is difficult to envisage how the citizens of the special-status Province could have the same rights within the Federal state, as a whole, as the citizens of the other Provinces.

"Opting out" and "opting in" are different matters. Such arrangements do not require special constitutional powers and indeed do not affect the division of powers. They are in effect a type of delegation, and if provided for in the Constitution, would be permanently available to all Provinces. If they were, as is usually the case, rendered possible by Federal legislation, they would be completely within the sovereign control of the Federal Parliament and could be rescinded at will.

The Committee recommends that there should continue to be exclusive lists of Federal and Provincial powers but with an extended list of concurrent powers.

Concurrent powers which predominantly affect the national interest should grant paramountcy to the Federal authority and those which predominantly affect the Provincial or local interest should grant paramountcy to the Provincial authorities.

The Constitution should permit the delegation of executive and administrative powers (as it does now) but not of legislative powers except in the one instance (the criminal law power) where we recommend it below.

While the descriptions of the legislative categories found in the present division of powers remain valuable, since they have been subject to considerable judicial interpretation, some attempt should be made to eliminate ambiguous heads and provide for logically consistent categories. We do not, however, regard such a drafting project as our responsibility as a Parliamentary Committee. The details of our proposals for substantive change in the present division of powers are set out throughout the Report.

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Reference Papers

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(October 1975)

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CONSTITUTIONAL AMENDMENT IN CANADA*

Speaking in the House of Commons on October 2, 1974, the Leader of the Opposition, Mr. Robert Stanfield, and Prime Minister Pierre Elliott Trudeau agreed on the anomalous position of Canada, a sovereign nation not yet possessed of the complete legal power to amend certain parts of its own Constitution. The Prime Minister added that he hoped it would be possible, with the co-operation of the Opposition and the provinces, to adopt a Canadian amending formula within four years. The current situation, which is at times hard to explain to an outsider, is historical in origin and has been perpetuated by the difficulty of reaching agreement on the nature of a Canadian amending mechanism.

Canadians are well aware of this limitation, and many efforts have been made in the past to find a satisfactory method of amending the Constitution of Canada exclusively in Canada. To that end, several federal-provincial conferences were convened. So far, however, these efforts have not been successful.

This paper will discuss what the conferences tried to accomplish and, from a legal point of view, what is meant by the "amendment of the Constitution in Canada". The first question that arises, therefore, is: What do we mean by "Constitution of Canada"?

The Constitution of Canada is popularly thought to be the British North America Act of 1867 and its subsequent amendments, and a reference to constitutional amendment is usually intended to mean the amendment of the British North America Acts. What *is* the "constitution" of a country? It may be defined as the system of written laws and unwritten conventions by which a state is governed.

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* This paper was originally issued in May 1964, as a revised version of an article in the February 1962 edition of the *Canadian Bar Journal* prepared by E.A. Dreidger, Q.C., then Deputy-Minister of Justice and Deputy Attorney General of Canada. The paper has been revised and updated to September 1975 by the Department of External Affairs. It was edited in November, 1977 by the Canadian Unity Information Office.

These laws and conventions may be formally expressed, as in the case of the United States Constitution. In that country, the word "Constitution" means a particular document. In Britain, however, there is no document that is known as the Constitution. The Constitution there consists partly of written material, partly of conventions that have not been given official expression, and partly of statutes relating to some aspect of government.

No single constitutional document

In Canada there is no document that purports to set out the complete law pertaining to the country's government. The Constitution, as in the case of Britain, consists in part of written material and in part of conventions or customs. While the B.N.A. Act of 1867, with its subsequent amendments, is the major constitutional document of Canada, it is not, in fact, an exhaustive statement of the laws and rules by which Canada is governed. The written constitutional material further includes other British statutes (such as the Statute of Westminster, 1931), and British Orders-in-Council (notably those admitting various provinces and territories to federation). Included as well are statutes of the Parliament of Canada relating to such matters as the Succession to the Throne, the Royal Style and Titles, the Governor General, the Senate, the House of Commons, the creation of courts, the establishment of government departments, the franchise, elections, and statutes of provincial legislatures of a fundamental constitutional nature similar to those listed above. Other written instruments, such as the Royal Proclamation of 1763, the Letters Patent of October 1, 1947, constituting the office of Governor General of Canada, the Commission of the Governor General, and federal and provincial Orders-in-Council of a fundamental constitutional nature authorized by their respective statutes provide further constitutional material, as do those decisions of the courts that have interpreted the B.N.A. Acts and other statutes of a constitutional nature.

In addition, the Constitution of Canada includes substantial sections of the common law, unwritten constitutional usages and conventions and principles of representative and responsible government. The preamble to the B.N.A. Act states that it was the desire of the original provinces to be federally united "with a constitution similar in principle to that of the United Kingdom"; accordingly, many of the usages and conventions of government that had been developed in Britain have thrived and are evolving in the Canadian context. For example, it is a convention that the Government will resign or ask for a dissolution of Parliament (and a new election) upon the passing of a non-confidence motion by the House of Commons. This is not set out in any law, but is among the usages and principles governing out Cabinet system of responsible government.

Amending authorities

Constitutional amendments may consist of changing existing law or of making new law. Authority to make constitutional amendments is, therefore, simply authority to make constitutional laws.

The question arises: Who now has authority to amend the Constitution of Canada? Considering that expression in its widest sense as indicated above, we must look first at the British North America Act of 1867. We find that there are provisions in that act that are subject to alteration either by the legislatures of the provinces or by the Parliament of Canada. Thus Sections 40, 41, 47, 130 and 131 begin with the words "unless the Parliament of Canada otherwise provides". These provisions are therefore amendable by the Parliament of Canada. Similarly, Sections 78, 83, 84, 134 and 135 apply unless the appropriate legislature "otherwise provides", and they are therefore subject to alteration by provincial enactment. Under Head (1) of Section 92, the legislatures of the provinces have express authority to amend the constitution of the province, except as regards the office of lieutenant governor. Under this authority, the legislatures have authority to change and have changed sections such as 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 83, 84 and 85. It should be pointed out, however, that the actual texts of these provisions of the B.N.A. Act are not subject to change by Parliament or the legislatures; it is not the act as such that is amendable but rather the law as expressed in those provisions. The enactment by Parliament or the legislatures, as the case may be, substitutes a new law for the law contained in those sections of the B.N.A. Act; but that is, in every sense, a constitutional amendment.

Constitutional laws may also be made by Parliament or the legislatures under the enumerated heads of Section 91 or 92. Thus, under Head (8) of Section 91 or Head (4) of Section 92, laws could be made respecting offices involved in the Constitution.

Section 129 of the B.N.A. Act of 1867 continues in force then-existing laws, but subjects them to repeal, abolishment or alteration by the Parliament of Canada or the legislatures of the respective provinces, according to the authority of Parliament or the legislatures under the B.N.A. Acts. It follows that any pre-Confederation laws of a constitutional character are amendable by Parliament or by the legislatures of the provinces according to their jurisdiction under the B.N.A. Acts. Originally, an important limitation on such powers was imposed by the exception from the provisions of Section 129 of Acts of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland that extended to Canada.

Furthermore, shortly before the passage of the B.N.A. Act, 1867, the British Parliament enacted the Colonial Laws Validity Act of 1864. This act had the effect of nullifying a colonial enactment if it was repugnant to any act of the British Parliament. The laws of Britain applicable in its colonies were of two kinds -- namely, those that were applicable by adoption by the local legislature and those that were applicable *in proprio vigore* (that is to say, by force of their own terms). The former, being enactments of the local legislatures, could be repealed by them. The latter, however, could not be altered by the local legislatures. It has been held by the courts that the limitations of the Colonial Laws Validity Act applied only to Imperial Acts in force in a colony *in proprio vigore*, and not such as were applicable by adoption. The Colonial Laws Validity Act was, therefore, a further fetter on the legislative power of Parliament and the provinces.

Thus, by virtue of Section 129 of the B.N.A. Act, 1867, as originally in force, and by virtue of the Colonial Laws Validity Act, neither Parliament nor the provincial legislatures of Canada could repeal or amend an act of the British Parliament that extended to Canada by virtue of its own terms, and any act passed by a legislative body in Canada would be void or inoperative if it was repugnant to any British act.

Statute of Westminster

The limitations imposed by the Colonial Laws Validity Act were removed by the Statute of Westminster of 1931, Section 2 (22 George V, c.4 (U.K.)). The limitation imposed by Section 129 of the B.N.A. Act was also removed, except (at Canada's request) as to the British North America Acts 1867 to 1930. Today, the Parliament of Canada or the legislatures of the provinces have the power to repeal or amend any act of the British Parliament, except the B.N.A. Acts 1867 to 1930. It follows that, if any acts of the British Parliament other than the B.N.A. Acts of 1867 to 1930 applicable to Canada are of a constitutional character, they may be repealed or altered by the appropriate legislative body in Canada.

The terms of the Statute of Westminster raise an interesting question. The sole limitation on legislative power in Canada, according to Section 7 of that act, is the inability to amend the B.N.A. Acts, 1867 to 1930. This collective title includes the original act of 1867 and all amendments to 1930. Yet there have been amendments since 1930. The collective title is now British North America Acts 1867 to 1975. Does the phrase "1867 to 1930" include later amendments? Apparently not. Mr. E.A. Driedger, Q.C., concluded simply, in an article in the *Canadian Bar Journal* in August 1968, that

Parliament or the legislatures might amend or repeal any British statute forming part of the Constitution of Canada if it had been passed after July 10, 1930 (the date of assent to the last of the series 1867 to 1930) and if that statute was in relation to a matter within the legislative competence of Parliament or the legislatures, as the case might be.

Another interesting question is whether the power conferred to amend British statutes extends to the Statute of Westminster itself, since it is not included in the collective title B.N.A. Acts 1867 to 1930.

An amendment to the B.N.A. Act passed by the British Parliament in 1949 considerably enlarged the authority of the Parliament of Canada to legislate with respect to constitutional matters by adding a new Head (1) to Section 91 of the B.N.A. Act. The Parliament of Canada may now amend the Constitution of Canada except as regards the distribution of legislative authority between Parliament and the legislatures, the rights and privileges of any class of persons with respect to schools, the use of the English and French languages, the requirement of at least an annual session of Parliament and, except in cases of emergency, the maximum five-year life of each Parliament.

The British Parliament still retains a theoretical power to make constitutional laws for Canada, without limit. Theoretically (but subject to compliance with the requirements prescribed in the Statute of Westminster -- namely, request and consent by Canada), the British Parliament could make any laws of any character having application in Canada. In practice, however, this power is not exercised except with regard to that residue of the constitutional amending power that does not now fall within the competence of any legislative authority in Canada. Therefore, no act of the British Parliament affecting Canada is passed unless it is requested and consented to by Canada. Conversely, every amendment requested by Canada in the past has been enacted, and there is no evidence to suggest that in future a British Parliament would reject or obstruct requested amendments to the B.N.A. Act.

At present, therefore, constitutional laws for Canada may be made by the Parliament of Canada, by the legislatures of the provinces or by the British Parliament. As we have seen, the Parliament of Canada may make constitutional laws under Head (1) of Section 91, under other provisions of the British North America Act, and also under Sub-section (2) of Section 2 of the Statute of Westminster. The legislatures of the provinces may make constitutional laws under Head (1) of Section 92, under other provisions of the British

North America Act and also under Sub-section (2) of Section 7 of the Statute of Westminster.

Circle of authority

The situation may be represented by a circle divided into three segments. One segment represents the authority of the Parliament of Canada to make constitutional laws. Another segment represents similar authority possessed by the legislatures of the provinces. The remaining segment represents the area of jurisdiction that is beyond the authority of Parliament or of the legislatures; the sole power to make constitutional laws in this residual area rests with the British Parliament. In addition, the British Parliament has, theoretically, a concurrent jurisdiction over the federal and provincial segments.

The problem of finding a suitable method of amending the Constitution of Canada exclusively in Canada involves two things. First it must be decided what are the appropriate legislative bodies in Canada to which should be transferred jurisdiction over that segment of our circle that is now within the exclusive authority of the British Parliament. Secondly, we must remove from the British Parliament the jurisdiction it now has over this segment, and also the concurrent jurisdiction it now possesses over the areas included in the segments of our circle now falling within the jurisdiction of Parliament or of the legislatures.

Constitutional amendment was discussed briefly by the Dominion-Provincial Conference of 1927. A special committee of the House of Commons at the 1935 session of Parliament studied and reported on the best method by which the British North America Act might be amended. Constitutional amendment was again discussed at a dominion-provincial conference in 1935; a sub-committee was appointed to prepare a report on a method of procedure to amend the Constitution of Canada; a report was duly submitted, but no further action was taken. In 1950, a conference was convened to find a method of amending the Constitution entirely in Canada but, while considerable progress was made in clarifying issues, the conference did not succeed in finding an amending formula likely to be acceptable to all governments concerned.

A conference of attorneys-general was convened in October 1960 with a view to arriving at a basis for the amendment of the Constitution of Canada, and met four times in the succeeding 14 months. These conferences drew up a draft statute under the leadership of E. Davie Fulton, then Minister of Justice, but some differences of view remained and the plan was not carried through to completion. It was

later completed, and became known in 1964 as the "Fulton-Favreau Formula", the latter name being that of the Minister of Justice at that time, Guy Favreau. This text was approved by the federal-provincial conference of the Prime Minister and premiers on October 14, 1964.

The Fulton-Favreau Formula provoked varied opposition, particularly to its perceived inflexibility and to the possibility that differences of opinion would arise as to the rule applicable in any particular case. Opposition in the Province of Quebec was particularly strong; some opponents even claimed that the Formula was a "straitjacket" that would hinder the development of a cherished "special status". Following more than a year of debate and delay, Mr. Lesage, then Premier of Quebec, concluded that his government would postpone indefinitely its consideration of the Formula. With this refusal to sanction the proposal, the unanimous approval of the provinces that Ottawa had sought as a matter of sound political practice (though not legal necessity) was left unachieved.

Constitutional discussions were renewed in February 1968, with the convening of a conference of first ministers, and agreement was reached to embark on a comprehensive review of the Constitution. From that date to June 1971, fundamental questions were examined in six sessions of first ministers, many sessions of ministers on special subjects, and some two dozen meetings of officials. A session in February 1971 indicated wide agreement on a number of matters, including a formula for amending the Constitution, and resolved to discuss draft texts as well as the issue of social policy and income security measures at the seventh meeting of first ministers in June 1971 in Victoria, B.C.

Victoria Conference

Much preparation preceded the Victoria meeting, including bilateral discussions and the deliberations of committees of ministers and officials. From these efforts and the extensive negotiations at the Victoria Conference itself, came the "Canadian Constitutional Charter, 1971", perhaps (in one commentator's words) "the most important product of the nation's attempt at constitutional review and revision". A number of constitutional reforms were proposed in the Charter, certain fundamental political freedoms were entrenched, and a new mechanism for amending the constitution was set down, which would have cleared the way for the "patriation" of the Constitution.

In general, in the nine predominantly English-speaking provinces, public opinion and politicians showed themselves to be in favour of the proposed Charter. However, strong opposition to it quickly deve-

loped in Quebec. Mr. Bourassa, the Quebec Premier, had, with his delegation, attempted to gain constitutional control over an integrated scheme of social and income security services through the entrenchment of an absolute control by provincial legislatures over federal laws in these areas. Though some concession was made in this direction by the Conference, the proposals of Quebec in these matters were, by and large, turned down. On June 23, 1971, the office of Premier Bourassa issued a statement saying that his government could not accept the Victoria Charter, citing in particular the "uncertainty" in the texts dealing with income security. Once again the unanimous approval of the provinces was not forthcoming, a unanimity agreed upon at Victoria as the appropriate (if not customarily required) vehicle for adoption of such a fundamental document as the Charter.

Amending formula

Basically, in devising an amending formula, care must be taken to ensure that there is no interference with the powers of Parliament and the legislatures. An amending formula should not, for example, make it impossible for the provinces alone to amend their constitutions, as they may now do under Head (1) of Section 92; nor should there be taken from Parliament the powers it now has under the various sections of the British North America Act that confer upon it power to amend the Constitution of Canada in matters of purely federal concern. However, it should be pointed out (and this was made clear during the 1950 conferences) that there is some objection to the wide powers conferred on Parliament by the new Head (1) of Section 91, and it is no doubt felt by some that an acceptable amending formula should include some change in the authority conferred by this provision.

The Fulton-Favreau Formula of 1961-1964 had attempted to meet these considerations. It proposed the abrogation of the powers still held by the British Parliament to amend that part of the B.N.A. Act that had been left under its jurisdiction in 1949. It provided for a Canadian mechanism for amending the B.N.A. Act that would have allowed Canada to make amendments with the co-operation of the legislative bodies of all the provinces. The Formula provided that a number of entrenched sections -- those concerning the amending formula itself, provincial legislative powers and the rights and privileges of the provincial governments and legislatures, the assets and property of a province, the use of the English and French languages, guarantees concerning schools, and the protection afforded the parliamentary representation of a province in Section 51A of the B.N.A. Act -- would be amendable only with the unanimous agreement of Parliament and all ten provincial legislatures. The amending

formula further provided that an amendment that referred to one or more, of the provinces, but not all of them, must be concurred in by the province or provinces to which it referred. For all parts of the B.N.A. Act not otherwise specifically dealt with, amendments would have required the concurrence of the legislatures of at least two-thirds of the provinces, representing at least 50 per cent of the population of Canada. This latter provision comprises, *inter alia*, the federal legislative powers.

Another feature of the draft act embodying the Fulton-Favreau Formula was the provision for the mutual delegation of legislative power between the Federal Parliament and the provincial legislatures in compensation for the rigidity that the entrenchment of provincial powers might imply. Delegation was restricted for the provinces to four matters in the classes of subjects enumerated in Section 92 of the B.N.A. Act, although among these was the important subject of property and civil rights. It was further restricted in that the Federal Parliament could not legislate on the matter unless the legislatures of at least four provinces consented. The enactment would not have effect in any province unless the legislature of that province had consented to its operation in that province. If Parliament declared, however, that the passage of the act concerned fewer than four provinces, only those concerned would have to agree to its adoption. A provincial legislature, on the other hand, could enact laws to be applicable in that province in relation to any matter coming under the legislative jurisdiction of the Federal Parliament, provided that the latter agreed and provided that a similar law had been passed by the legislatures of at least three other provinces. Under the Formula, individual provinces could withdraw their consent in either of the two instances of delegation, but the delegation would continue to hold good for those provinces that continued to consent to it.

Finally, it was proposed that the French text of the act incorporating the amending formula be made legally official by incorporating it into the text of the act to be passed by the British Parliament.

The failure of the Fulton-Favreau Formula did not end the still-unfinished tale of attempts to "patriate" the B.N.A. Act. Fresh steps, from 1968 to 1971, led to the "Canadian Constitutional Charter, 1971" (or "Victoria Charter"). Despite the rejection by Quebec of the Charter, it represents the results of many years of discussions and negotiation and most of its articles were acceptable to all the heads of government present at Victoria, including the Premier of Quebec.

Victoria Charter

The amendment procedure of the Charter is more flexible than the ill-fated Fulton-Favreau Formula. It does not contain provisions requiring unanimity for any amendment proposal. Under it, the Constitution as it affects all of Canada could be altered through the agreement of the Federal Parliament and the legislatures of six of the ten provinces, provided that among the six were Ontario and Quebec (each of which has more than 25 per cent of the Canadian population), two of the four provinces in the Atlantic region, and two of the four west of Ontario, provided they contained at least 50 per cent of the population in that region. If any other province attained a population 25 per cent of the whole, it also would acquire the same entrenched position as Ontario and Quebec. What this amounted to was a kind of regional assent, with the large provinces having a veto and the small ones unable alone to paralyze the mechanism. Amendments that did not concern all the provinces would require the consent only of the Federal Government and the provinces concerned. Amendments to the Constitution would be proclaimed by the Governor General when authorized by resolutions of the Senate and the House of Commons and the legislatures of a majority of the provinces according to the special formula.

Article 51 of the Charter introduced a new element by restricting the powers of the Senate where amendment was concerned. If the Senate had not given its authorization within 90 days after approval of the amendment by the House of Commons, the amendment would be made without Senate authorization, provided it had been passed a second time by the Lower House. The amendment could be proposed by the Senate, the House of Commons or a provincial legislative assembly.

Article 55 stipulated that, notwithstanding certain exceptions to the procedure described above, the following matters could be amended only in accordance with that procedure: the office of the Queen, of the Governor General and of lieutenant-governor; requirements respecting yearly sessions of the Parliament of Canada and the legislatures of the provinces; the powers of the Senate, representation in the Senate and the residence qualifications of Senators; the right of a province to have at least as many representatives in the House of Commons as in the Senate; proportionate representation of the provinces in the House of Commons; and the requirements of the Charter respecting the use of the English and French languages.

At Victoria, all the governments agreed to accept in the Constitution certain fundamental political freedoms: freedom of thought,

conscience and religion; freedom of opinion and expression; and freedom of peaceful assembly and association. With these were cited certain fundamental principles of the Constitution, such as universal suffrage and free democratic elections to the House of Commons and the legislatures. The Charter also forbade any denial of the right to vote or hold office in the House of Commons or a provincial legislature on grounds of race, ethnic or national origin, colour, religion or sex. All these rights appear to be already present in the laws and practices of Canadian democracy. Other subjects covered in the Charter concerned the Supreme Court, regional disparities, federal-provincial consultation, language rights and certain social security measures.

The fate of the Canadian Constitutional Charter, 1971, has also been reviewed above. With its rejection by Quebec, the most recent major chapter in federal-provincial negotiation with a view to the amendment of the constitution of Canada was closed.

The shaping of a new Constitution for Canada cannot, in the words of the late Guy Favreau, "be portrayed as the fruit of a single mind or a single day's work; it is a monument sculpted patiently, with chisels made of patriotic concessions, by statesmen who, from ministry to ministry, saw themselves as Canadians first".

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The following extract is from the report "The Amendment of the Constitution of Canada" which was prepared under the Honourable Guy Favreau Minister of Justice and published in February 1965. The report is the major document of what is referred to as the Fulton-Favreau Formula (proposals for constitutional reform advanced initially by E. Davie Fulton and later modified by Guy Favreau.)

This extract deals with the "repatriation" of the Constitution and explains the basic problem that is created by the absence of Canadian control over our own Constitution.

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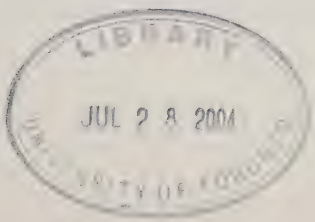

THE AMENDMENT OF THE CONSTITUTION OF CANADA

HONOURABLE GUY FAVREAU
MINISTER OF JUSTICE
FEBRUARY 1965

Reprinted August 1965

CHAPTER IV

THE AMENDING FORMULA EXPLAINED

GENERAL

As has been indicated, the amending formula that has now been agreed upon by the federal government and the governments of all the provinces embodies principles that were developed during the four major conferences of 1935-36, 1950, 1960-61 and 1964.

The 1935-36 Conference identified four categories of amendments: (1) those affecting Canada only; (2) those affecting Canada and one or more but not all of the provinces; (3) those affecting Canada and all the provinces and which should require majority consent; and (4) those affecting Canada and all the provinces, and which are of such nature as to require the unanimous consent of the provinces. The formula also stipulated which provisions of the British North America Acts would fall within each category.

The 1950 Conference recommended that for amendment purposes, the provisions of the British North America Act should be grouped in six categories: (1) those concerning Parliament only; (2) those concerning the provincial legislatures only; (3) those concerning Parliament and one or more but not all of the provincial legislatures; (4) those concerning Parliament and all of the provincial legislatures; (5) those concerning fundamental individual and provincial rights; and (6) those that should be repealed. It was also recommended that a different amending procedure should be applied to each of the first five of these categories.

The 1960-61 Conference accepted the 1950 categories in principle and proceeded to seek agreement on amending procedures applicable to each. The Conference agreed at the outset that language and education provisions (category 5) should be amendable by Parlia-

ment only with the consent of all the legislatures; that provisions relating to some but not all the provinces (category 3) should be amendable by Parliament with the consent of the provinces concerned.

In relation to category (4), it was agreed that some provisions applicable to all the provinces should be amendable with something less than unanimous consent, but that others might more appropriately be included in the same category as language and education, and be subject to amendment only with the concurrence of all the provinces. Discussions were concerned primarily with the question of which of the provisions should require such unanimous consent. The Conference also followed up the suggestion of the 1950 Conference regarding delegation, and agreed that such a provision should be included.

The amending formula that emerged from the 1960-61 Conference represented a reconciliation of most of the views put forward up to that time. It provided an amending procedure for all but two of the main categories recommended at the 1950 Conference, namely, provisions which concern Parliament only (category 1) and provisions which concern the provincial legislatures only (category 2). These were discussed by the 1960-61 Conference, but were put over for further consideration until final agreement on the other categories could be reached.

The 1964 Conference began by accepting the 1960-61 formula in principle. Discussion centered largely on the two categories not covered in 1960-61: whether and in what way the amending power of Parliament under 91(1) and the amending power of the provinces under 92(1) should be embodied in the amending formula, so as to make it complete. It was agreed that these powers should be included and accordingly provisions were incorporated in the amending formula to replace those contained in 91(1) and 92(1). In other respects, except for a few minor amendments not affecting substance, the 1960-61 amending formula was accepted as it stood.

The 1964 formula thus incorporates all of the five amending categories recommended at the 1950 Conference which in turn had been broadly defined by the 1935-36 Conference. It therefore represents a basic conception which prevailed or evolved through four series of conferences over a period of nearly thirty years.

To have effect, the amending formula must now be enacted into law. It comprises, in essence, a final amendment to the series of United Kingdom statutes known as the British North America Acts,

and it is therefore necessary that the formula itself be enacted by the United Kingdom Parliament. Like that of 1960-61, the 1964 formula includes a renunciation clause whereby the United Kingdom Parliament renounces any further right to pass statutes that will form part of the law of Canada.

Once the amending formula has been enacted, it will become part of the law of Canada. Thereafter the formula itself—as well as all of the British North America Acts—will be under the complete and exclusive jurisdiction of the Parliament of Canada acting either alone or in combination with the legislatures of the provinces, as prescribed by the amending formula.

EXPLANATION OF CLAUSES

AN ACT TO PROVIDE FOR THE AMENDMENT IN CANADA OF THE CONSTITUTION OF CANADA

(Preamble)

WHEREAS Canada has requested, and consented to, the enactment of an Act of the Parliament of the United Kingdom in the terms hereinafter set forth, and the Senate and House of Commons of Canada in Parliament assembled have submitted Addresses to Her Majesty praying that Her Majesty may graciously be pleased to cause a Bill to be laid before the Parliament of the United Kingdom for that purpose:

Be it therefore enacted by the Queen's most Excellent Majesty by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

The preamble recites the facts that Canada has requested and consented to the enactment of the amending formula, and that the Senate and House of Commons of Canada have submitted Addresses to the Crown. This recital of Canada's request and consent is in accordance with section 4 of the Statute of Westminster, 1931. That section provides that no Act of the Parliament of the United Kingdom shall form part of the law of Canada unless the statute expressly declares that Canada has requested and consented to it. (Section 7 of the Statute of Westminster exempts the British North America Acts from this requirement, but since the amending formula contains a renunciation clause applicable to the United Kingdom Parliament, it is considered appropriate to include the recital.) In the past, amendments to the British North America Acts have been requested by a

formal parliamentary Address, and it is proposed that this procedure be followed in requesting enactment of the amending formula.

(*This preamble is different from the 1961 formula for purely technical reasons.*)

Part I

Power to amend the Constitution of Canada

1. Subject to this Part, the Parliament of Canada may make laws repealing or re-enacting any provision of the Constitution of Canada.

Under the proposed Act, future constitutional amendments will be enacted by the Parliament of Canada. Such amendments, however, may be made only in accordance with the particular provisions of the amending formula that may be applicable to each amendment, depending on its nature and subject matter.

The proposed Act confers not only authority to *amend*, but also to *repeal* or *re-enact*. Thus, any time Canada should so desire, the whole of our constitutional statutes may be transferred to the statutes of Canada. Meantime, they continue as part of the laws of Canada.

(*This clause is unchanged from the 1961 formula.*)

2. No law made under the authority of this Part affecting any provision of this Act or section 51A of the British North America Act, 1867, or affecting any provision of the Constitution of Canada relating to

(a) the powers of the legislature of a province to make laws,

(b) the rights or privileges granted or secured by the Constitution of Canada to the legislature or the government of a province,

(c) the assets or property of a province, or

(d) the use of the English or French language,

shall come into force unless it is concurred in by the legislatures of all the provinces.

This clause specifies certain classes of amendments that may be made by Parliament only with the consent of the legislatures of all the provinces. It deals in part with categories 2 and 5 of the 1950 Conference. The subjects included under this provision are those that are believed to be of fundamental concern to all the provinces as well as to the federal government.

Paragraphs (a) to (d), and especially (a) and (d), could be said to represent essential conditions on which the original provinces united to form the Canadian Confederation, and on which other provinces subsequently joined the union. Changes in these basic conditions—such as in the powers allocated to provincial legislatures—could alter

their status in relation to Parliament, thus changing the conditions on which the provinces entered Confederation.

Accordingly, the constitutional conferences agreed that the matters set forth in this clause should be changed only with the consent of Parliament and all the legislatures.

(This clause is substantially the same as the one in the 1961 formula.)

3. (1) No law made under the authority of this Part affecting any provision of the Constitution of Canada that refers to one or more, but not all, of the provinces, shall come into force unless it is concurred in by the legislature of every province to which the provision refers.

(2) Section 2 of this Act does not extend to any provision of the Constitution of Canada referred to in subsection (1) of this section.

This clause provides for the amendment of constitutional provisions that relate to one or more but not all the provinces, as referred to in category 3 of the 1950 Conference.

(This clause is unchanged from the 1961 formula.)

4. (1) No law made under the authority of this Part affecting any provision of the Constitution of Canada relating to education in any province other than Newfoundland shall come into force unless it is concurred in by the legislatures of all the provinces other than Newfoundland.

(2) No law made under the authority of this Part affecting any provision of the Constitution of Canada relating to education in the province of Newfoundland shall come into force unless it is concurred in by the legislature of the province of Newfoundland.

(3) Sections 2 and 3 of this Act do not extend to any provision of the Constitution of Canada referred to in subsections (1) and (2) of this section.

This clause refers to amendment of constitutional provisions with respect to education, included in category 5 of the 1950 Conference. Such provisions have always held a special significance in Canada's constitutional framework. They were developed by a long historical process and they establish, in particular, the essential rights of religious minorities within the educational system. All constitutional conferences have thus recognized that these provisions should be particularly and fully protected.

A special provision for Newfoundland is included because the Newfoundland Terms of Union contain a special education clause that is applicable to that province alone.

(This clause is unchanged from the 1961 formula.)

5. No law made under the authority of this Part affecting any provision of the Constitution of Canada not coming within section 2,

3 or 4 of this Act shall come into force unless it is concurred in by the legislatures of at least two-thirds of the provinces representing at least fifty per cent of the population of Canada according to the latest general census.

This clause provides for the amendment of constitutional provisions not covered by any of the preceding clauses, and represents the formula for category 4 of the 1950 Conference. It would require at the present time, for example, concurrence of at least seven of the existing provinces' legislatures, representing at least half the Canadian people.

These requirements are considered sufficient to assure that proposed amendments in this category are generally acceptable—not only in the federal context as represented by Parliament, but also in the provincial context. At the same time, they permit more flexibility than that allowed by clauses (2) and (4), which require unanimity for the enactment of fundamental constitutional amendments.

(*This clause is unchanged from the 1961 formula.*)

6. Notwithstanding anything in the Constitution of Canada, the Parliament of Canada may exclusively make laws from time to time amending the Constitution of Canada in relation to the executive Government of Canada, and the Senate and House of Commons, except as regards

(a) the functions of the Queen and the Governor General in relation to the Parliament or Government of Canada;

(b) the requirements of the Constitution of Canada respecting a yearly session of Parliament;

(c) the maximum period fixed by the Constitution of Canada for the duration of the House of Commons, except that the Parliament of Canada may, in time of real or apprehended war, invasion or insurrection, continue a House of Commons beyond such maximum period, if such continuation is not opposed by the votes of more than one-third of the members of such House;

(d) the number of members by which a province is entitled to be represented in the Senate;

(e) the residence qualifications of Senators and the requirements of the Constitution of Canada for the summoning of persons to the Senate by the Governor General in the Queen's name;

(f) the right of a province to a number of members in the House of Commons not less than the number of Senators representing such province;

(g) the principles of proportionate representation of the provinces in the House of Commons prescribed by the Constitution of Canada; and

(h) the use of the English or French language.

This clause was added in 1964, to complete the 1960-61 formula. It represents category 1 of the 1950 Conference and it replaces the

present head (1) of section 91 of the British North America Act, enacted in 1949. Its phrasing, however, differs from the provisions it replaces.

The first difference is a change in the general authority conferred by the opening words. Since 1949, the authority has been to amend the "Constitution of Canada", with the exceptions listed following these words and having regard to certain fundamental rights of the provinces, the minorities and Parliament itself. Under the 1964 formula, the authority is to amend "the Constitution of Canada in relation to the executive Government of Canada, and the Senate and House of Commons", with the exceptions listed thereafter. This change was made in order to remove the possibility that the more general language of the 1949 provision could be interpreted as giving Parliament authority to act unilaterally in matters of provincial concern.

Another change is in the exceptions from Parliament's general power as set forth in paragraphs (a), (d), (e), (f) and (g) of clause 6. Some of these may be covered by the more generally-phrased exceptions contained in the present 91(1), but it was the consensus of the 1964 Conference that these were matters in which the provinces have a legitimate interest and that therefore they should be expressly excluded from Parliament's unilateral amending authority.

(It should be noted in this respect that although the 1960-61 formula did not embrace the amending power of Parliament, as set forth in 91(1), clause (2) of the 1960-61 formula was intended to remove the substance contained in paragraph (f) above from Parliament's unilateral power.)

By virtue of clause 8, constitutional provisions excepted from amendment under clause 6 would become subject to amendment under other clauses of the amending formula. The applicable clause would depend on the subject matter and nature of the proposed amendment. Paragraphs (f) and (h), for example, are expressly covered by clause 2, and amendments in respect of these questions would require the unanimous consent of all provincial legislatures. The other exceptions generally would come under clause 5, unless the nature of an amendment were such that it came within one of the areas for which a particular procedure is laid down.

(*This clause was not included in the 1960-61 formula.*)

7. Notwithstanding anything in the Constitution of Canada, in each province the legislature may exclusively make laws in relation to the amendment from time to time of the Constitution of the province, except as regards the office of Lieutenant-Governor.

This clause incorporates, without change, the provincial amending power as conferred by head (1) of section 92 of the British North America Act and represents category 2 of the 1950 Conference.

(*This clause was not included in the 1960-61 formula.*)

8. Any law to repeal, amend or re-enact any provision of the Constitution of Canada that is not authorized to be made either by the Parliament of Canada under the authority of section 6 of this Act or by the legislature of a province under the authority of section 7 of this Act is subject to the provisions of sections 1 to 5 of this Act.

This clause makes it clear that any amendments not coming within clauses 6 or 7 are to be dealt with under clauses 1 to 5 as may be appropriate. (See also final paragraph in discussion of clause 6.)

(*This clause was not included in the 1960-61 formula.*)

9. Nothing in this Part diminishes any power of the Parliament of Canada or of the legislature of a province existing at the coming into force of this Act, to make laws in relation to any matter.

This clause preserves to Parliament and the legislatures any amending power they might possess under specific provisions of the Constitution.

(*This clause is similar to one included in the 1960-61 formula.*)

10. No Act of the Parliament of the United Kingdom passed after the coming into force of this Act shall extend or be deemed to extend to Canada or to any province or territory of Canada as part of the law thereof.

This is the renunciation clause referred to in discussion of the preamble.

(*This clause is unchanged from the 1960-61 formula except in a technical respect.*)

11. Without limiting the meaning of the expression "Constitution of Canada", in this Part that expression includes the following enactments and any order, rule or regulation thereunder, namely,

(a) the British North America Acts, 1867 to 1961;

(b) the Manitoba Act, 1870;

(c) the Parliament of Canada Act, 1875;

(d) the Canadian Speaker (Appointment of Deputy) Act, 1895, Session 2;

(e) the Alberta Act;

(f) the Saskatchewan Act;

(g) the Statute of Westminster, 1931, in so far as it is part of the law of Canada; and

(h) this Act.

Clause 11 defines what is meant by the expression "Constitution of Canada".

(*This clause is unchanged in substance from the 1960-61 formula.*)

to authorize the exercise of certain legislative authority by Parliament, it could be given the right to act in respect of those provinces, and the tenth province could in theory emerge in a special position by declining to do so. This would not be because of any action on its part, but because of action by the other provinces, in which it declined to join. What would emerge, even in this improbable situation, would not be a special constitutional position for a single province. It would be a different administrative situation. A change in the constitutional positon could be brought about only by appropriate amendments of substance to the Constitution itself.

"REPATRIATION" OF THE CONSTITUTION

The process of bringing the Constitution of Canada entirely under Canadian control—so that it is no longer necessary to seek action by the British Parliament when amendment is wanted—has been referred to frequently as the "repatriation" of our Constitution. Strictly speaking, it is incorrect to use the word "repatriation" in this sense. It implies the return to Canada of something that was here originally, and the full responsibility for our Constitution has never been vested in Canada.

The term, however inaccurate, has been found convenient and has been widely used. This has resulted in some confusion as to the precise nature of the procedure being sought. There has been misunderstanding as to whether the intention was to establish an amending formula entirely within Canadian control or whether it was to have a new Constitution established by new enactment within this country.

While there has been confusion in language, there has been no doubt in the various conferences as to the essential intention: to establish a means by which the Constitution could be dealt with in every respect by Canadian legislative bodies. For once such control has been established entirely within Canada, it would then be possible to take whatever further action might be desirable—to leave the Constitution substantially as it stands; to modify it in particular respects; or to repeal it and substitute something completely new in its stead. Full and final authority to amend must come first, and the problem was to secure agreement on a method of amendment acceptable to the provinces and to the federal government. With such agreement enacted into law, any further action could be taken through use of the new amending formula.

The difference between authority for amendment in Canada and "repatriation" has been recognized by previous conferences.

Following the Conference of 1935, which established a Continuing Committee on Constitutional Questions, a sub-committee was set up to study the problems both of amendment and "repatriation". It recommended that priority be given to finding an amending procedure for the British North America Act along lines that it set forth in detail. In addition, it recommended that a new Constitution should be established for Canada.

It recognized, however, that if such a Constitution were established by Canadian re-enactment, there would have to be prior provisions to ensure that the protections for the provinces incorporated in the recommended amending procedure could not be removed in the process of re-enactment. The device recommended by the sub-committee was to suggest that the Statute of Westminster be revised so as to include in it the precise limitations under which the Parliament of Canada could enact the new Constitution. The sub-committee said that the Statute should require the new Constitution of Canada to perpetuate the provisions of the British North America Act, together with its amendments and other constitutional legislation; to include as its amending procedure precisely the one proposed by the sub-committee for the British North America Act itself; to carry forward without change the constitutional relationships between the Dominion and the provinces as they existed at that time; and finally that the Constitution should not operate as a new law, but rather as a Canadian declaration of the British North America Act, its amendments and other constitutional provisions. In other words, there would be a new Constitution in form, but not in substance. It would be enacted by the Parliament of Canada, but under conditions and limitations laid down in British statutes.

The Constitutional Conferences in 1950 ended without agreement on an amending procedure, but they directed a Continuing Committee of Attorneys-General to carry on the study of "the proposals which it received, with a view to arriving at an amending procedure satisfactory to all governments concerned". In addition, this Committee was authorized "to study the methods and techniques whereby a Canadian Constitution can be domiciled in Canada as a purely Canadian instrument". The Continuing Committee did not succeed in either. It did not arrive at agreement on an amending procedure; it did not work out a way by which "a Canadian Constitution" might be "domiciled" in Canada.

The difficulties experienced in 1935 and 1950 were reflected in a proposal put forward by the federal government when the Constitutional Conferences of 1960 opened. It suggested that, since it appeared to be so difficult to work out an amending procedure acceptable to all concerned, a possible course might be to "repatriate" the Constitution first, and work out a final amending procedure later.

It was apparent, however, that such action would be impossible if it meant placing full control over the Constitution in the hands of Parliament alone. Thus it was proposed to have the amending procedure transferred to Canada on the basis that until a more detailed and flexible formula could be worked out no change would be made by Parliament except with the unanimous consent of all provincial legislatures.

This proposal had one obvious disadvantage: if a final formula were not achieved, Canada would be left with a Constitution that could be amended only by unanimous consent, except in those areas that came under the exclusive control of Parliament or the provincial legislatures. The 1960 Conference accordingly decided that the right course would be to continue seeking agreement on a suitable amending formula.

The Conference of 1964 was able to start with a formula fully worked out in 1960-61, except with regard to inclusion in it of the amending powers provided in sections 91(1) and 92(1). With agreement on these, a comprehensive amending formula that was satisfactory to all the governments concerned was at last established.

To translate the proposed amending formula into law, a new and final amendment of the British North America Act by the British Parliament is required. Once that enactment has been passed, it will be possible for the Parliament of Canada, or the legislatures of the provinces, or the two acting together, to make any change that is at any time in the future wanted in our Constitution. The British Parliament will have divested itself of all power to legislate with regard to this country and control will, for the first time, be completely and entirely in Canada. In the sense that legislative control is the critical question, "repatriation" will have been achieved.

The Conference of 1964, like the Conferences in 1960-61, did not go beyond this. Neither Conference formally considered the question of whether it would be desirable, as an exercise of the amending procedure, to re-enact the British North America Acts in Canada or to enact a new Constitution in some different form. It was felt the essential requirement was to secure enactment of an amending pro-

cedure. Subsequent action could then be considered at the time and to the extent desired by the governments involved.

It would, however, be feasible, if it were thought desirable, to prepare a consolidation in one document of the constitutional acts that now apply to Canada. It would not be sufficient to include only the original British North America Act and the specific amendments to it, since there are other statutes of a constitutional nature such as the Manitoba Act, the Alberta Act, the Saskatchewan Act, the Terms of Union of Prince Edward Island, British Columbia and Newfoundland with Canada, the Rupert's Land Act and others.

To re-enact these would be technically complex but not too difficult. Whether it would be worth doing—whether it would have any practical significance—is another question.

Another possible course would be to leave the Constitution as it now stands—but with the amending procedure entirely in Canadian hands —and delay any further action until there is agreement on constitutional changes in the future.

Whatever further steps may be agreed upon—whether to consolidate our existing Constitution, to revise it or to replace it—they are exercises of Canadian capacity dependent only on the agreement of the Canadian community. Any of them will be possible entirely within Canada for, once the amending procedure has been enacted into law, full power to act will rest in Canada and nowhere else.

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